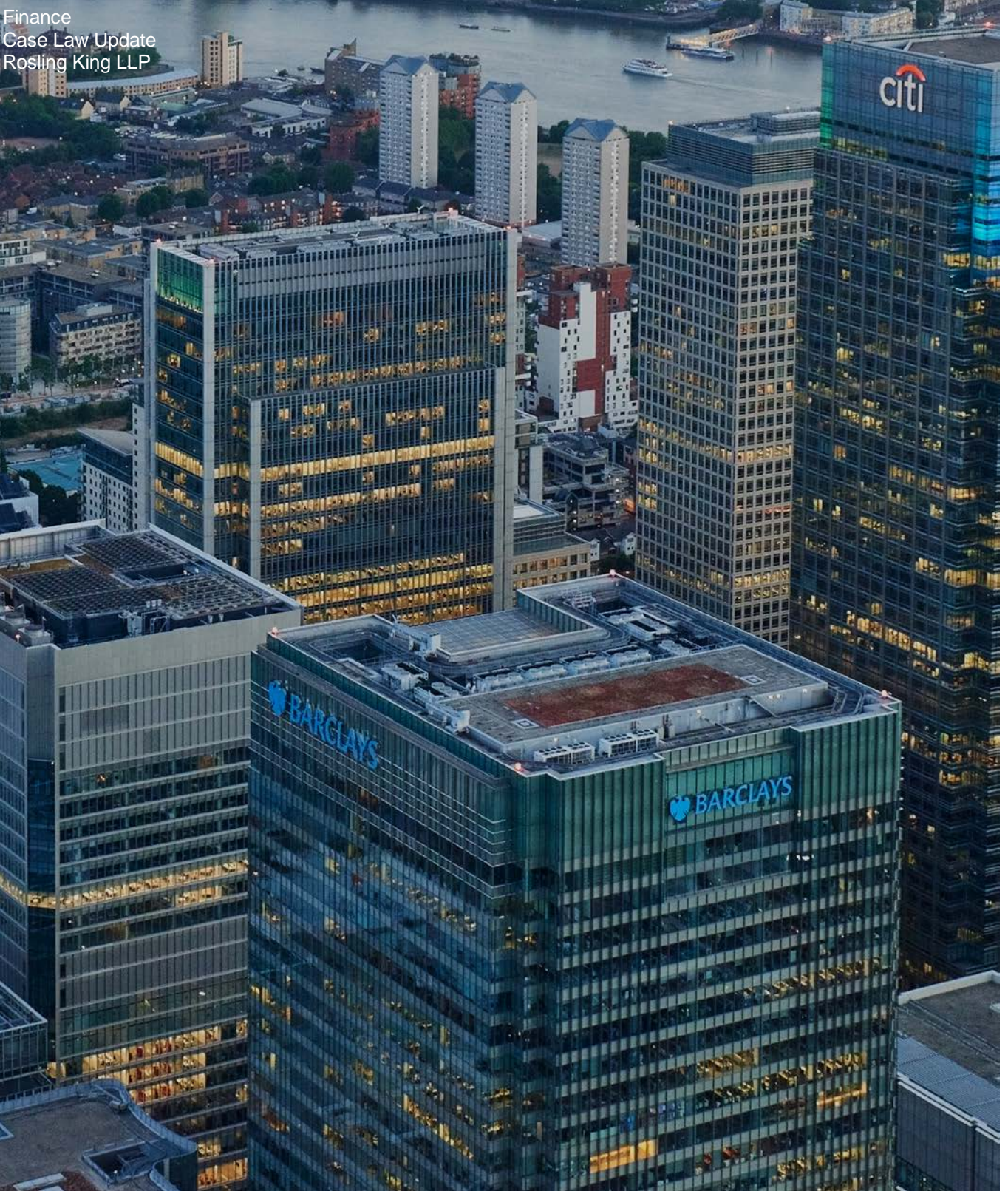


Finance
Case Law Update
Rosling King LLP



CML Handbook does not change solicitor duties to mortgagee clients

This important Court of Appeal decision confirms that the CML (Council of Mortgage Lenders) Handbook does not supercede, override or in any way exclude the application of the well-known Bowerman principle.

The Facts

The case is unusual as it came about as a contribution claim. The valuers, esurv sought a contribution to a payment they had made to a lender from the solicitors on the same transaction under the Civil Liability (Contribution) Act 1978.

In this case, esurv was instructed by a lender to value a Property, but was subsequently sued by the lender for preparing a negligent valuation. That claim ended with esurv paying the lender a sizeable sum in damages. They then sought a contribution from Goldsmith Williams who had acted as solicitors on the same transaction, on the basis that, if the lender had decided to sue the solicitor, it too would have been found to be in breach of duty and would have had to pay the lender damages.

Esurv argued that the solicitor was under a duty to advise the lender in relation to facts discovered by them in the course of investigating title, which a reasonably competent solicitor would realise might have a material bearing on the valuation of the lender's security, or some other ingredient of the lending decision (the "Bowerman Duty").

The solicitors argued that they were not under a duty to report facts such as the date of sale and purchase price of the property and their obligations were limited to investigating and reporting on title, save where there was evidence of fraud. They relied on the CML Handbook as the basis of their retainer and argued it was to be read as a "comprehensive and exclusive code" setting out the duties of a solicitor to a lender.

The Decision

The Court of Appeal considered the scope of the duties of a solicitor when acting for both borrower and lender and recognised that there may, on occasion, be situations where a solicitor faces a potential conflict of duty. However, no such conflict arose in this case.

Relying on the case of *Nationwide Building Society v Balmer Radmore* [1999] PNLR 606, Sir Stanley Burton held that the question of whether the Bowerman Duty applies in a given case depends on whether the duty was excluded, or was inconsistent with the terms of the solicitor's retainer. On this proviso, the CA held that they were "unable to accept the suggestion...that the provisions of the CML's Handbook are inconsistent with the Bowerman duty".

Lord Justice Patten agreed with Sir Stanley Burton and held: "*the duty to draw the differences between the price and the valuation to the lender's attention was...a necessary incident of the solicitor's instructions to investigate and report on title, unless expressly excluded by the terms of the retainer*". In particular, Lord Justice Patten rejected the solicitor's argument that

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the CML Handbook was deliberately intended to limit the duty of disclosure to instances of fraud.

Commentary

This is a welcome decision for lenders. There is no longer any doubt that the CML Handbook does not preclude the operation of the Bowerman Duty. A solicitor must therefore continue to advise lender clients of any information which may cast doubt on a valuation, or any other ingredient of the lending decision. Although the Court of Appeal suggests that the application of the Bowerman Duty is dependent on the terms of the written retainer, in most cases it will be difficult to argue that the Bowerman Duty does not apply.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.